No. 87-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONNA OBERG, *et al.*,
Petitioners,
v.
THE AETNA CASUALTY & SURETY CO.
and A. H. ROBINS CO.,
Respondents.

ALEXIA ANDERSON, *et al.*,
Petitioners,
v.
THE AETNA CASUALTY & SURETY CO.
and A. H. ROBINS CO.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this Chapter 11 reorganization, the Court of Appeals had previously reviewed and affirmed the reorganization court's decision to enjoin preliminarily the prosecution of certain third-party litigation found to be "related to" the reorganization. *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 251 (1986). Did the reorganization court abuse the discretion conferred upon it by the broad grant of equitable powers under Section 105(a) of the Bankruptcy Code when it subsequently denied petitioners' request to be relieved from that injunction so as to be permitted to institute "related to" litigation in another forum where 1) the effect of allowing such litigation would be to disrupt the debtor's effort to reorganize, and 2) the petitioners' litigation interests were being protected *ad interim* in a class action being supervised by the same district judge?

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JOINT BRIEF IN OPPOSITION

Respondents A. H. Robins Company, Incorporated ("Robins"), and The Aetna Casualty and Surety Company ("Aetna")[1] respectfully submit this joint brief in

[1] As required by Rule 28.1 of the Rules of the United States Supreme Court, Robins states that its subsidiaries, not wholly owned, are: Lee Laboratories, Incorporated, Riddick Communica-

opposition to the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *In re A. H. Robins Co.*, 828 F.2d 1023 (4th Cir. 1987). For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

This petition arises from the reorganization case of Robins, under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* As observed by the United States Court of Appeals for the Fourth Circuit, Robins sought relief under Chapter 11 because it was

> [c]onfronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as the Dalkon Shield.

A. H. Robins Co. v. Piccinin, 788 F.2d 994, 996 (4th Cir.), *cert. denied*, 107 S. Ct. 251 (1986) (hereinafter cited as *Piccinin*).

With the filing of Robins' voluntary petition on August 21, 1985, the automatic stay of 11 U.S.C. § 362(a) barred the commencement or continuation of any suit for prepetition claims against Robins, including all Dalkon Shield suits. Under the circumstances attendant to this unique Chapter 11 case, however, the automatic stay did not provide Robins with the "breathing spell" from such suits required to facilitate the reorganization. Suits against other persons and entities associated with the Dalkon

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tions, Eurand Italia, S.p.A., Eurand International, S.r.l., Eurand Microencapsulation, S.A., Eurand de Mexico, S.A. de C.V., Phariab Industrial Company, A. H. Robins Farmaceutica, S.A., Pharco Laboratories, Ltd., and A. H. Robins-Showa Co., Ltd. Aetna is affiliated with Aetna Life & Casualty Co.

Shield—such as hospitals, doctors, medical supply houses, and Aetna, Robins' liability insurer—continued unabated.

As the sole manufacturer of the Dalkon Shield, Robins necessarily is involved in every suit claiming injury relating to the manufacture, marketing and use of the Dalkon Shield. Therefore, unlike situations surrounding the asbestos litigation and the associated bankruptcy cases in which many firms manufactured the products involved, continuation of the Dalkon Shield litigation directly threatened to impede Robins' reorganization effort. The decade of Dalkon Shield litigation preceding the Chapter 11 case taught that, at a minimum, Robins inevitably would become involved in discovery aimed at its officers and employees who had been associated with the Dalkon Shield. At the worst, Robins faced new claims for indemnity or contribution from these defendants.

The United States District Court for the Eastern District of Virginia, the Honorable Robert R. Merhige, Jr. presiding ("the District Court"), remedied this extraordinary situation with appropriately tailored relief. On October 11, 1985, the District Court entered its preliminary injunction order restraining the continuation of eight classes of Dalkon Shield actions against third parties that traditionally had been named in Dalkon Shield actions as co-defendants with Robins ("the Preliminary Injunction Order"). Appendix ("App.") at 1a-9a. One such class of actions, represented by the case of Anna Piccinin, comprised suits against Aetna "under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty." Ms. Piccinin appealed the Preliminary Injunction Order to the Fourth Circuit, which affirmed the District Court. *Piccinin*, 788 F.2d 994 (4th Cir. 1986). This Court denied her petition for further review by writ of certiorari. 107 S. Ct. 251 (1986).

On August 9, 1986, approximately 200 plaintiffs, all of whom are claimants in the Chapter 11 case, commenced an action in the United States District Court

for the District of Kansas, styled *Anderson, et al. v. Aetna Casualty & Surety Co.* ("the Anderson Action"). On August 21, 1986, the complaint in the Anderson Action was amended to add almost 4,000 additional plaintiffs. Again, each of the individuals added was simultaneously pressing a Dalkon Shield claim against Robins in the Chapter 11 case.

As stated in the Petition, the claims against Aetna in the Anderson Action attempted to associate Aetna with alleged wrongdoing with respect to the Dalkon Shield and the defense of actions against Robins in the prepetition period. *See* Pet. at 4. Aetna, of course, denies these allegations.

The Anderson Action was dismissed by the parties shortly after its filing, pursuant to the terms of consent orders in which the plaintiffs acknowledged that they were required first to obtain relief from the Preliminary Injunction Order before filing any similar action.[2] At this juncture, the plaintiffs in the Anderson Action split into three groups: (1) a group of roughly 1,400 claimants ("the Anderson claimants") who sought leave to refile the Anderson Action in the Kansas court, (2) one group of 26 claimants ("the Oberg claimants") who sought relief from the Preliminary Injunction Order to file an identical complaint in New Hampshire under the caption *Oberg et al. v. Aetna Casualty and Surety Co.*,

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[2] An example of the consent orders signed by counsel for all 4,200 plaintiffs in the Anderson Action is included in the appendix to this brief at 10a-12a. In these consent orders, each attorney acknowledged that he understood

> that he or anyone else by reason of this Court's Orders may not file any other suit or action arising from or related to the Dalkon Shield without first obtaining from the United States District Court in Richmond relief from the Stay and this Court's Preliminary Injunction Order dated October 11, 1985, or other such appropriate order from this Court expressly permitting the filing of such suit or action.

App. at 11a.

and (3) an even larger group of nearly 2,500 claimants who have not pursued the matter since the dismissal of the Anderson Action.

The District Court denied the requests of the Anderson claimants and the Oberg claimants for relief from the Preliminary Injunction Order, relying on the Fourth Circuit's affirmance of that order in *Piccinin*. The District Court also observed that a complaint seeking a class action against Aetna on behalf of all Dalkon Shield claimants, *Breland, et al. v. Aetna Casualty & Surety Co.* ("the Breland Action") had been lodged with it and was under consideration. If certified as proposed, the class in the Breland Action would encompass all of the Anderson claimants and the Oberg claimants. Based on these observations, the District Court expressly declared that its denial of the requests for relief from the Preliminary Injunction Order was without prejudice to the movants' right to refile their motion if the Breland Action "did not fairly and adequately dispose of their concerns." 828 F.2d at 1025. Both the Oberg and Anderson claimants appealed.

Drawing upon its seminal decision in *Piccinin*, the Fourth Circuit affirmed both rulings by the District Court. *In re A. H. Robins Co.*, 828 F.2d 1023 (4th Cir. 1987) (*"Oberg"*). Whereas the *Piccinin* opinion had exhaustively reviewed all the grounds supporting the full sweep of the Preliminary Injunction Order's reach, the court in *Oberg* focused exclusively on suits against Aetna in a role other than Robins' liability insurer. Holding fast to *Piccinin*, the Fourth Circuit held that the District Court's restraint of these claimants' proposed suits against Aetna was an appropriate exercise of its authority granted by 11 U.S.C. § 105.

As the Fourth Circuit first opined in *Piccinin*, Section 105 empowers a bankruptcy court to enjoin actions against non-debtors upon a showing that the prosecution of such actions "might interfere in the rehabilitation

process . . . ." *Piccinin*, 788 F.2d at 1003. As applied to the instant preliminary injunction, that interference is the product of "the burden placed on Robins' officers, directors, and employees, which would exhaust their energies and thus interfere with the debtor's reorganization." *Oberg*, 828 F.2d at 1026. Contrary to Petitioners' assertion that their proposed actions "will have no conceivable adverse financial impact on the estate of the debtor Robins," Pet. at 20; *see also id.* at (i), 9, the Fourth Circuit recognized that such interference with the reorganization effort could have a fatal financial impact on Robins.

Although the Anderson and Oberg claimants pledged that they would not involve Robins and its personnel in discovery or other aspects of their proposed cases against Aetna, this offer does not provide Robins adequate protection: "Oberg and Anderson can agree not to impose any of the burdens of litigation upon Robins, but they cannot compel Aetna to follow the same hands-off policy." *Id.* at 1026. To the contrary,

> Aetna must involve Robins in this litigation. Aetna's primary defense logically will be that Robins—not Aetna—is responsible for the injuries suffered by these plaintiffs, and that any detrimental actions taken by Aetna were on behalf of or at the direction of Robins.

Id.[3] In any event, Aetna's intention to seek discovery from Robins and otherwise involve Robins' personnel in these actions, if permitted, is a matter of record.

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[3] The Fourth Circuit also observed that under the comparative negligence law of Kansas that would apply in the Anderson Action, Aetna must affirmatively prove Robins' percentage of the alleged fault. *Id.* The 26 Oberg claimants, however, argue that this observation demonstrates the error in the opinion because New Hampshire law has no "comparative negligence" standard. This response misses the point. If the doctrine of comparative negligence is inapplicable, then Aetna must shift to Robins all, not part, of the blame.

REASONS FOR DENYING THE WRIT

This case presents no important or novel question, nor does it involve application of the law in a manner inconsistent with opinions of this Court or other courts of appeals. Rather the issues are fact-specific and involve the District Court's discretionary use of its equitable powers, consistent with applicable law, to protect the debtor from involvement in potentially overwhelming litigation.

A. The interpretation placed upon Section 105(a) of the Bankruptcy Code by the reorganization court and by the court of appeals recognizes, correctly, the limitations of that grant of equitable powers and merely reflects a fact-specific exercise of such powers in the unique circumstances of this complex reorganization.

As it must, Petitioners' argument begins with an attack upon the propriety of the *Piccinin* decision upholding the preliminary injunction. In *Piccinin*, the court of appeals enumerated five bases for the Preliminary Injunction Order including the "all writs" provision of the Bankruptcy Code, Section 105(a).[4] In its decision denying Petitioners' request to be excepted from the Preliminary Injunction Order, the Fourth Circuit reaffirmed that Section 105(a) permits such an injunction under appropriate circumstances.[5] As shown below, this decision comports with Section 105's legislative history and the existing case law.

Although Petitioners contend that the Preliminary Injunction Order cannot be squared with the legislative

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[4] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105.

[5] Petitioners' salvo directed at the portions of *Piccinin* relating to the automatic stay of 11 U.S.C. § 362 need not be returned. Petition ("Pet.") at 11-12. The parties and the courts below agreed that this aspect of the Preliminary Injunction Order rests upon Section 105. The Fourth Circuit specifically reserved any question of the availability of contribution or indemnity against Robins and the applicability of 11 U.S.C. § 362(a)(3). 828 F.2d at 1025-26.

intent in enacting Section 105(a), the only evidence of Congress' intent cited in the Petition is a selectively edited passage appearing in both the House and Senate Reports. *See* Pet. at 14. The complete passage is far more instructive.

> The court has ample other powers to stay actions not covered by the automatic stay [of 11 U.S.C. § 362]. Section 105 . . . grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity. . . . Stays or injunctions issued under [Section 105] will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee [or debtor in possession] move the court into action, rather than requiring the stayed party to seek relief from the stay. There are some actions, enumerated in the exceptions [to Section 362], that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6298; S. Rep. No. 589, 95th Cong., 2d Sess. 51, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5837 (citations only omitted). In essence, Congress determined in Section 362(a) that certain actions must be enjoined *in every case*. Beyond these activities, Congress granted to the courts the authority to enjoin other actions upon due consideration of the facts *in a particular case*.

Thus, in stark contrast to Petitioners' argument that Congress intended to rigidly restrict the bankruptcy court's power to stay proceedings to the confines of Sec-

tion 362(a), the Bankruptcy Code cloaks courts with sufficient power to expand the stay beyond the automatic provisions of Section 362 (1) upon application and (2) consistent with the traditional powers of a court of equity. The District Court's Preliminary Injunction Order is exemplary of such a ruling. Indeed, the Preliminary Injunction Order's ability to pass muster under the traditional test for such an order is already a matter of judicial record.

Although the Petition thrice charges that the District Court entered the Preliminary Injunction Order without any adherence to the applicable rules or evidentiary support, *see* Pet. at 13, 15, 19, the opposite is true. The Preliminary Injunction Order recites the steps followed:

> The cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered [Robins] complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved.

App. at 2a.

The Preliminary Injunction Order proceeds from this preamble to make each of the four findings required for entry of a preliminary injunction order: (1) irreparable harm to the bankruptcy estate in the absence of the restraint, App. at 2a-6a, (2) strong likelihood of success on the merits (i.e., a successful reorganization), App. at 6a, (3) less likelihood of irreparable harm to the restrained party, App. at 6a, and (4) advancement of the public interest, App. at 7a. *See In re Provincetown Boston Airline, Inc.*, 52 B.R. 620, 625 (Bankr. M.D. Fla. 1985).

See also Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980). More to the point, the District Court took evidence regarding the pending civil action against Aetna by Ms. Piccinin and made these required findings with specific reference to actions by Dalkon Shield claimants against Aetna "under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty." App. at 4a.

Furthermore, with respect to the deleterious effect on the reorganization by the diversion of the debtor's key personnel, as well as Robins' need to participate in discovery and necessary monitoring of thousands of ongoing Dalkon Shield suits against co-defendants—a matter belittled by Petitioners—the District Court found from the evidence presented that such actions against co-defendants

> would require the participation of Robins' officers, executives and employees as witnesses and in pretrial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

App. at 3a. Finally, the District Court held that its conclusions of law "shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court." App. at 7a.

Every aspect of the Preliminary Injunction Order was challenged in the *Piccinin* appeal and was rejected by the Fourth Circuit. When this court denied further review, those issues were closed; the injunction was in place and fully operative. Thus, when the Petitioners came before the District Court in the instant matter, the question was not whether they were enjoined by the Preliminary Injunction Order. That issue had been decided. Instead, the issue was whether they should be relieved from the

Preliminary Injunction Order. In other words, having been subject to a valid injunction, the burden now was on Petitioners to show good cause why that injunction should be lifted. Petitioners failed in this showing.

Petitioners were unable to demonstrate that their position materially differed from Piccinin's. In fact, this Court's own records refute Petitioners' attempt to distinguish themselves from Ms. Piccinin. Petitioners' argument that their action falls beyond the scope of *Piccinin* is based upon their claim that no asset of the Chapter 11 estate will be placed in jeopardy. This, however, is precisely the argument advanced by Piccinin.

> Piccinin . . . seeks to proceed solely against Aetna on the issue of Aetna's independent liability for its own conduct and any judgment recovered would operate directly against Aetna and not on the Debtor's insurance or any other asset of Debtor's estate. Moreover, Piccinin has filed no claim in this Chapter 11 proceeding against Debtor.

Piccinin v. A. H. Robins Co., No. 86-211, *Petition for Writ of Certiorari* at 41.

Furthermore, Petitioners were incapable of making adequate assurances that relieving these 4,000 claimants from the preliminary injunction would not lead to the diversion of personnel forecast by the District Court. To the contrary, Aetna gave the District Court its assurance that it would seek to defend itself fully, including shifting any blame to Robins, if appropriate.

B. Even though the decision to issue or withhold an injunction under Section 105(a) will vary from case to case, depending on the circumstance presented, there is no dispute among the circuits as to the general interpretation to be given that provision in the Bankruptcy Code; and no important question of federal law is presented in the present case which requires resolution by this Court.

The Preliminary Injunction Order also is fully consistent with the weight of the existing judicial precedent as

first established by the court in *In re Otero Mills, Inc.*, 25 B.R. 1018, 1021 (D.N.M. 1982). In contrast to the picture of slim judicial support for *Otero Mills* and its progeny that is painted by Petitioners, the courts of virtually every circuit have cited *Otero Mills* favorably and adopted its view that Section 105(a) permits an injunction broader than the automatic stay when traditional principles of equity require. *See, e.g., In re S. I. Acquisition, Inc.*, 817 F.2d 1142, 1146 n.3 (5th Cir. 1987); *In re Brentano's, Inc.*, 36 B.R. 90, 92 (S.D.N.Y. 1984); *In re Lion Capital Group*, 44 B.R. 690, 701-02 (Bankr. S.D. N.Y. 1984); *In re Monroe Well Service, Inc.*, 67 B.R. 746, 751-52 (Bankr. E.D. Pa. 1986); *In re Electronic Theatre Restaurants Corp.*, 53 B.R. 458, 462 (N.D. Ohio 1985); *In re Forty-Eight Insulations, Inc.*, 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985); *In re Peoples Bankshares, Ltd.*, 68 B.R. 536, 539-40 (Bankr. N.D. Iowa 1986); *In re Kalispell Feed & Grain Supply, Inc.*, 55 B.R. 627, 629 (Bankr. D. Mont. 1985); *In re TRS, Inc.*, 76 B.R. 805, 806-08 (Bankr. D. Kan. 1987); *In re A & B Heating & Air Conditioning, Inc.*, 48 B.R. 397, 401 (Bankr. M.D. Fla. 1985).

The courts of appeals considering *Piccinin* have not rejected its teaching but have restricted it to the specific unusual fact situation presented in that case. *See Teachers Insurance & Annuity Ass'n v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) (observing that the Fourth Circuit found the requisite "unusual circumstances" in the Robins reorganization); *In re S. I. Acquisition, Inc.*, 817 F.2d 1142, 1148 (5th Cir. 1987). Because Petitioners are claimants in the Robins Chapter 11 case, they fall precisely within the same "unusual circumstances" existing in *Piccinin*.

Even the cases cited by Petitioners do not support a reading of Section 105(a) that would prohibit the action taken by the District Court in enjoining the third party litigation over the Dalkon Shield. For example, in *In re A. J. Mackay Co.*, 50 B.R. 756 (D. Utah, 1985), a case cited by Petitioners as being in conflict with

Piccinin, Pet. at 16, the court actually acknowledged that a stay of third party litigation may be required in appropriate circumstances. *Mackay* involved a stay of co-defendant litigation *after* plan confirmation. The court, however, did "not hold that, in extraordinary cases, a non-bankrupt co-debtor cannot be protected prior to confirmation of a plan." 50 B.R. at 762.

Similarly, the Preliminary Injunction Order does not conflict with this Court's decision in *Landis v. North American Co.*, 299 U.S. 248 (1936), which recognized that stays of litigation are necessary in "rare circumstances." *Id.* at 255. This reorganization case is a most rare circumstance, indeed. More importantly perhaps, the Preliminary Injunction Order does not require Petitioners "to stand aside while a litigant in another [cause] settles the rule of law that will define the rights of both." *Id.* Petitioners are claimants in the Chapter 11 case and are not being asked to stand aside. Instead, they are being asked not to burn the candle at both ends while the bankruptcy court is seeking to formulate a plan of reorganization providing payment in full of their claims.

The pendency of the motion for class certification in the *Breland* case further supports the District Court's decision not to lift its injunction to permit the filing of the actions proposed by Petitioners. Unlike Petitioners' proposals, the *Breland* case offered the potential of benefiting all the Dalkon Shield claimants in the Chapter 11 case. Furthermore, because *Breland* was pending before the same District Court handling the Robins reorganization, that court was assured the necessary control over this litigation to insure that it was not allowed to interfere with the progress of the Chapter 11 case.

In sum, the Petition does not bring a novel, important question to this Court. Instead, it brings a question that now has been decided twice by the Fourth Circuit in a manner that is fully consistent with the existing judicial interpretations of the Bankruptcy Code. Under all the circumstances attendant to this singular reorganization,

the court of appeals correctly affirmed the actions of the District Court.

C. An end is in sight.

The Petition concludes with the unfounded assertion that the Preliminary Injunction Order remains in place "with no termination date in sight." Pet. at 21. As the point has been raised by Petitioners, this Court should know that an end to the Preliminary Injunction Order is in sight. Presently before the bankruptcy court is Robins' proposed Fifth Amended Plan of Reorganization.[6] Unlike its predecessors, this proposed plan enjoys the endorsement of all the major committees in the Chapter 11 case, including the official Dalkon Shield Claimants' Committee. A hearing on the adequacy of the accompanying disclosure statement now is scheduled for March 21, 1988.

CONCLUSION

A paramount objective of Chapter 11 of the Bankruptcy Code is to provide an opportunity for a debtor successfully to reorganize. Section 105(a) of the Code, as it may be applied in a Chapter 11 reorganization, is an important tool permitting reorganization courts to shield debtors from disruption and diversion of resources that may threaten or impede the reorganization effort. The power to enjoin other litigation, if necessary to protect the reorganization effort, is widely recognized as within the Section 105(a) grant. Also recognized is the need, as in the case of any injunction, to balance the equities in the light of the extant circumstances presented.

The very reason for the Robins reorganization petition was the devouring cost, both in money and in energies, of the thousands of Dalkon Shield claims being prosecuted prepetition, claims which named not only Robins but other persons and entities associated in one manner or another with it. It became apparent soon after the

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[6] This version of the plan contains only technical revision of the Fourth Amended Plan of Reorganization, which also was endorsed by all committees.

filing of the Robins petition that continuation of the pre-petition litigation, even if only against the related parties, would consume substantial resources and threaten the reorganization. That determination led to the imposition of the Preliminary Injunction Order. That injunction was reviewed by the court of appeals and its necessity in the circumstances of this complex reorganization has been twice affirmed.

At the date of the orders denying Petitioners relief from that injunction, over 300,000 persons had registered with the reorganization court their intent to make a claim based on alleged Dalkon Shield related injuries. Were the reorganization court to have allowed Petitioners to commence and prosecute litigation against Robins' insurer, Aetna, in a different forum—litigation that inevitably would have drawn Robins into discovery and, ultimately, trials—no principled basis would have existed for denying the same relief to the hundreds of thousands of other claimants. It was certainly not an abuse of discretion, in these unique circumstances, to deny Petitioners relief from the injunction. For the reasons stated above, the petition should be denied.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11

Case No. 85-01307-R

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

Employer's Tax Identification No. 54-0486348

Adversary Proceeding

No. 85-1006-R

(Retained Proceeding)

A. H. ROBINS COMPANY, INCORPORATED,
Plaintiff,

v.

NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY and VERNON DICHARRY, ANNA PICCININ, LUISA MOSA and JACK MOSA, STELLA J. CAMP and JOHN H. CAMP, HELEN BARNETT and MICHAEL BARNETT, and EDNA LINDSEY RUMINSKI,
Defendants.

[Filed Oct. 11, 1985]

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered plaintiff's complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved:

Findings of Fact

As of August 21, 1985, the plaintiff in this action, A. H. Robins Company, Incorporated ("Robins") was named as the defendant in approximately 5,000 civil actions in state and federal courts throughout the country alleging injuries and seeking damages stemming from Robins' manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. Pursuant to 11 U.S.C. Section 362(a), all litigation against Robins in those approximately 5,000 civil actions was stayed automatically on August 21, 1985 upon filing of Robins' petition for protection from its creditors under Chapter 11.

Approximately 2,400 of those civil actions name persons or entities other than Robins as co-defendants. Those approximately 2,400 civil actions seek damages from Robins co-defendants based upon theories of liability which are derivative of or interrelated with the causes of action or claims for relief asserted against Robins. Any judgment rendered against a Robins co-defendant in any one of those approximately 2,400 civil actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution. Al-

though Robins may be entitled to relitigate the issue of its liability to each indemnity or contribution claim, the burden on Robins' estate of such litigation would significantly impede Robins' reorganization and render any plan of reorganization futile.

Moreover, many of those 2,400 civil actions against the co-defendants would require the participation of Robins' officers, executives and employees as witnesses and in pre-trial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Any rejection by the debtor of its contractual duty to indemnify its officers, directors, and employees would adversely affect the debtor and would not be consistent with the debtor's reorganization under Chapter 11.

Defendant Nancy Campbell has a civil action pending in the United States District Court for The Western District of Wisconsin. In her complaint Ms. Campbell asserts claims against Robins, The Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., E. Claiborne Robins, Jr. and Dr. Hugh J. Davis. Ms. Campbell seeks recovery from those defendants under theories of negligence, strict liability, implied and express warranties, misrepresentation, fraud and under the Racketeer Influenced and Corrupt Organization Act ("RICO"). The

continuation of litigation in the Campbell Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Kathryn Conrad has a civil action pending in the Circuit Court for Baltimore City. In her complaint, Ms. Conrad asserts claims against Robins, Dr. Hugh J. Davis and Dr. Frederick A. Clark, Jr. Ms. Conrad seeks recovery from those defendants under theories of negligence, strict liability, fraudulent misrepresentation and conspiracy. The continuation of litigation in the Conrad action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Jeanette Dicharry and Vernon Dicharry have a civil action pending in The United States District Court for the Eastern District of Louisiana. In their complaint, the Dicharrys assert claims against Robins and Aetna Casualty and Surety Company (served herein as Aetna Life and Casualty). The Dicharrys seek recovery from those defendants under theories of strict liability, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Dicharry Action against Aetna Casualty and Surety Company threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Anna Piccinin has a civil action pending in The United States District Court for The Middle District of Alabama. In her complaint, Ms. Piccinin asserts claims against Robins and The Aetna Casualty and Surety Company. Ms. Piccinin seeks recovery from those defendants under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Piccinin Action against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort.

Defendants Luisa Mosa and Jack Mosa have a civil action pending in The United States District Court for the District of Maryland. In their complaint, the Mosas assert claims against Robins and Dr. Hugh J. Davis. The Mosas seek recovery from those defendants under theories of fraud and deceit, involuntary testing and battery, negligence, strict liability, breach of warranty, violation of the Federal Food and Drug Act and conspiracy. The continuation of litigation in The Mosa Action against Dr. Hugh J. Davis threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Stella J. Camp and John H. Camp have a civil action pending in The Circuit Court for Madison County, Alabama. In their complaint, the Camps assert claims against Robins, D.L.K., Incorporated and John or Jane Does numbers three through nine. The Camps seek recovery from those defendants under theories of negligence, strict liability, misrepresentation, breach of warranty, conspiracy and fraud. The continuation of litigation in The Camp Action against any of Robins' co-defendants threatens to impair and impede the debtor's reorganization effort.

Defendants Helen Barnett and Michael Barnett have a civil action pending in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. In their complaint, the Barnetts assert claims against Robins, Aetna Casualty and Surety Company, Florida Physicians Supply, Incorporated and Medical Supply Company of Jacksonville. The Barnetts seek recovery from those defendants under theories of willful negligence, fraud and misrepresentation, violation of State and Federal Food and Drug Acts, strict liability, breach of warranty and battery. The continuation of litigation in the Barnett Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Edna Lindsey Ruminski has a civil action pending in the Superior Court for the Judicial District of New Haven, Connecticut. In her complaint, Ms. Ruminski asserts claims against Robins and Dr. Marshall R. Holley. Ms. Ruminski seeks recovery from those defendants under theories of negligence. The continuation of litigation in the Ruminski Action against Dr. Marshall R. Holley threatens to impair and impede the debtor's reorganization effort.

The eight civil actions described above are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Conclusions of Law

The District Court exercising its jurisdiction under 28 U.S.C. Sections 1334(b) and (d), has the authority pursuant to 11 U.S.C. Section 105 and 28 U.S.C. Section 1651, to stay all actions which adversely affect the estate of the debtor and the debtor's reorganization effort and to stay all actions which will impair and impede the debtor's reorganization effort.

Robins has established that the likelihood of irreparable harm to Robins if this injunction is not granted outweighs the likelihood of irreparable harm to the defendants if the injunction is granted.

Robins has established the likelihood of its success on the merits and the likelihood of a successful reorganization if it is not burdened by continued litigation against it and its co-defendants.

Robins has established that the granting of this preliminary injunction is in the public interest.

The conclusions of law contained in this order constitute the law of this case and shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court.

To the extent any of the foregoing conclusions of law constitute findings of fact, they are to be deemed as such, and vice-versa.

Order

Based upon the foregoing, and good cause appearing therefor, it is hereby

DECLARED all available proceeds of liability insurance issued to Robins are property of the debtor's estate pursuant to 11 U.S.C. Section 541 and any civil action seeking a judgment that might be satisfied from the proceeds of that insurance is automatically stayed pursuant to 11 U.S.C. Section 362(a);

ORDERED defendant Nancy Campbell is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-C-230-S currently pending in the United States District Court for the Western District of Wisconsin; and further

ORDERED defendant Kathryn Conrad is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85231036 currently pending in the Circuit Court for the City of Baltimore, State of Maryland; and further

ORDERED defendants Jeanette Dicharry and Vernon Dicharry are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-1243 currently pending in the United States District Court for the Eastern District of Louisiana; and further

ORDERED defendant Anna Piccinin is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-H-9120-N currently pending in the United States District Court for the Middle District of Alabama; and further

ORDERED defendants Luisa Mosa and Jack Mosa are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. H82-49 currently pending in the United States District Court for the District of Maryland; and further

ORDERED defendants Stella J. Camp and John H. Camp are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-671-W currently pending in the Circuit Court for Madison County, State of Alabama; and further

ORDERED defendants Helen Barnett and Michael Barnett are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 83-5426 currently pending in the Circuit Court for the Ninth Judicial District, Orange County, State of Florida; and further

ORDERED defendant Edna Lindsey Ruminski is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-81-0209979-S currently pending in the Superior Court for the Judicial District of New Haven, State of Connecticut.

This injunction shall remain in force until further order of this Court.

DATED: 10-11-85

/s/ Robert R. Merhige, Jr.
United States District Judge

WE ASK FOR THIS;

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A. H. Robins Company, Incorporated

APPENDIX B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11

No. 85-01307-R

Retained Proceeding
(Judge Merhige)

IN RE A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

Employer's Tax Identification
No. 54-0486348

Adversary Proceeding

No. 86-1030-R

Retained Proceeding
(Judge Merhige)

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,
Plaintiffs,

v.

JOHN T. BAKER, *et al.*,
Defendants.

[Filed Sept. 12, 1986]

CONSENT ORDER

This day came the defendant Charles M. Delbaum ("Delbaum"), pursuant to this Court's Show Cause Order dated August 25, 1986, and the continuance granted at Delbaum's request, and proffered unto the Court the following settlement:

1. The action styled *Anderson, et al.* v. *Aetna Casualty & Surety Company*, Civil Action No. 86-1672-K, pending in the United States District Court for the District of Kansas (the "*Anderson* action"), was dismissed without prejudice on September 8, 1986, and A. H. Robins Company, Incorporated ("Robins") and The Aetna Casualty & Surety Company ("Aetna") have been furnished evidence of such dismissal.

2. Delbaum will, along with each of the other defendants herein, pay an equal share of Robins' and Aetna's attorneys' fees and costs incurred as a result of the filing of the *Anderson* action.

3. Delbaum understands that he or anyone else by reason of this Court's Orders may not file any other suit or action for injuries arising from or related to the Dalkon Shield without first obtaining from the United States District Court in Richmond relief from the Stay and this Court's Preliminary Injunction Order dated October 11, 1985, or such other appropriate order from this Court expressly permitting the filing of such suit or action.

Upon consideration whereof, and with the consent of Delbaum, the Court hereby ORDERS Delbaum to comply with the terms of his settlement agreement as set forth above.

Whereupon, Robins and Aetna, by their respective counsel, moved the Court for leave to withdraw their

joint motion for a finding of civil contempt with respect to Delbaum, which motion is hereby GRANTED.

ENTER: 9/12/86

/s/ Robert R. Merhige, Jr.
Judge

WE ASK FOR THIS:

/s/ Linda J. Thomason
Counsel for A. H. Robins,
Company, Incorporated

/s/ W. Scott Street, III
Counsel for The Aetna
Casualty & Surety Company

/s/ Charles M. Delbaum
CHARLES M. DELBAUM